87-1070

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

FOREIGN CREDIT INSURANCE ASSOCIATION,

Petitioner,

v.

NU-AIR MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a private sector export insurer, acting as the sole insurer of commercial credit risk, is immune from suit for negligent misrepresentations it makes to its commercial credit risk customer.

2. Whether established principles of waiver and estoppel apply to a customer's ordinary contract suit against a private sector export insurer of commercial credit risk.

LIST OF PARTIES AND RULE 28.1 LIST

Respondent Nu-Air Manufacturing Company ("Nu-Air") has no parent companies, subsidiaries, or affiliates to list within the meaning of Rule 28.1.

Pursuant to Rules 22.1 and 34.2, however, Nu-Air opposes the Foreign Credit Import Association's ("FCIA's") statement of "Parties to the Proceeding and Rule 28.1 List" in that it presents as a fact what is in reality an incorrect and argumentative assertion. Specifically, FCIA contends that under an agreement between it and the Export-Import Bank ("Eximbank"), FCIA's "members have no financial interest in the outcome of this case." Pet. p. ii. This seemingly benign remark, gratuitously inserted by FCIA in the ostensibly neutral introductory section of its petition, is really a legal argument that is integral to the new rule FCIA hopes this Court will adopt on the merits.[1] As this response demonstrates, this precise argument has been uniformly and categorically rejected by both of the Circuits that have considered it. In any event, FCIA's attempt to subtlely advance its legal position outside of the argument section of its petition under the guise of merely identifying the parties is inappropriate, and Nu-Air opposes it.

1/ FCIA's argument is that because in 1983 it entered into an agreement under which it has the ability to seek reimbursement from Eximbank for certain federal export insurance claims, Nu-Air's suit is effectively against Eximbank and the federal government. From this flawed premise, which has never been accepted by any federal appeals court, springs FCIA's self-serving conclusion that its members are not "financially interested" in this proceeding. Pet. pp. 3, 11, 12, 16.

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STATEMENT OF THE CASE

The section of FCIA's petition labeled "Statement of the Case" bears little resemblance to the actual determinative facts and issues on which the Eleventh Circuit based its thorough and well reasoned decision in this summary judgment appeal. Over one-half of FCIA's Statement is in reality a summary of argument coupled with a self-serving running commentary, without record references, on its view of its relationship to two entities not even before the Court, the federal government and Eximbank. Pet. pp. 3-5. All but lost are the core facts on which the Eleventh Circuit's decision actually turned. These facts, which are plainly

stated and readily available in the Court of Appeal's comprehensive twelve page published decision, *Nu-Air Manufacturing Co. v. Frank B. Hall & Company of New York,* 822 F. 2d 987 (11th Cir. 1987), are incorporated by reference.

That there is no basis for this Court to grant discretionary review in this case emerges despite FCIA's recasting of the pertinent facts and issues. Because of FCIA's strategy, however, the following opposing statement of the case is presented to clarify the record and correct the inaccuracies and omissions in FCIA's version. Rules 22.1, 34.2.

A. Statement of the Facts

Respondent Nu-Air Manufacturing Company is a Florida corporation engaged in the business of assembling aluminum goods. *Nu-Air Manufacturing Co.,* 822 F. 2d at 989. Petitioner FCIA is an association of private insurance companies that was established in 1961 at the encouragement of the Eximbank. *Nu-Air,* 822 F. at 989, n. 2. It issues insurance on behalf of the Eximbank, a federal agency. *Id.* at 994. FCIA's nineteen members, which include Aetna, Continental, Fireman's Fund, Hartford, and Liberty Mutual, are among the very largest insurance companies. Pet. p. 51a.

Nu-Air filed this diversity action in the Middle District of Florida against Intercredit Agency, its insurance broker, and FCIA, its export insurer.[2] This tort and contract suit was based on FCIA's denial of Nu-Air's $311,846.32 insurance claim. Nu-Air had made the claim under its export credit insurance policy for a loss incurred when a Nigerian buyer failed to pay for custom made aluminum doors and windows. *Id.* at 989-90.

2/ Although required by Rule 21.1(i), FCIA's petition does not show the basis for federal jurisdiction in the district court. Significantly, jurisdiction in this case was founded on diversity of citizenship under 28 U.S.C.A. § 1332, *not* on the existence of any federal question.

Against this background, the importance of correcting FCIA's inaccuracies and omissions is better understood. Had it fully and fairly depicted the record, FCIA would have been forced to acknowledge the bad facts from which it now seeks insulation by attempting to stretch inapplicable principles of governmental immunity and suspend the application of well settled rules of waiver and estoppel. In its futile attempt to make this ordinary insurance coverage dispute appear certworthy, FCIA has failed to mention a number of the unfavorable facts that help show both why this case does not qualify for review and why the result reached in the Eleventh Circuit was fair and just:

1. Under the specific terms of the policy involved in this case, the Eleventh Circuit recognized and FCIA conceded that FCIA was the exclusive insurer of "commercial risks," while Eximbank insured only "political risks." *Nu-Air,* 822 F. 2d at 994; Pet. brief p. 3. Since Nu-Air's claim was only under the commercial risk provision of its policy, FCIA was the sole insurer for the claim in issue. *Id.* Indeed, neither Eximbank nor the federal government is a defendant or even a party to this proceeding.[3/]

2. It was not merely "understood" by Nu-Air that it needed the SBCL to cover the Nigerian sale. Pet. p. 5. Instead, the parties stipulated and the Eleventh Circuit acknowledged that it was only because Nu-Air was actually told that the requested coverage was

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3/ As noted, in 1983, the year before the occurrence of the events giving rise to this litigation, Eximbank and FCIA entered into an agreement under which FCIA can seek reimbursement for commercial risk claims paid. *Nu-Air,* 822 F. 2d at 924 n. 22; Pet. p. 3. Of course, Nu-Air is not a party to that separate agreement, and the agreement did not even come into existence until *after* the pertinent events giving rise to this litigation had already occurred. *Id.* In any event, the reinsurance agreement does not affect the specific rights and relationship between Nu-Air and FCIA. *Id.*

in place that it accepted the Nigerian order. Without coverage, Nu-Air would have declined the order due to the order's large size and Nu-Air's unfamiliarity with Nigerian practices. *Nu-Air,* 822 F. 2d at 989; R1-36-3; R2-43-21.

3. Contrary to FCIA's statement, it was not established and the Eleventh Circuit did not hold that FCIA acted as Eximbank's agent with respect to the specific transaction in issue here. Pet. pp. 5-6. Instead, solely for the purpose of argument, the Court of Appeals assumed the question in FCIA's favor, since FCIA's claimed "agent of an agency" status made no difference in the outcome of the case. *Nu-Air,* 822 F. 2d at 994 n. 22.

4. By stating only that it issued a policy quotation but subsequently rejected Nu-Air's application for an SBCL, Pet. p. 5, FCIA fails to mention the legal validity of Nu-Air's claim for complete coverage for its loss. In this regard, the Eleventh Circuit held there was ample record evidence, including sworn testimony, for a jury to find FCIA and Nu-Air entered into a binding, enforceable oral agreement for *all* of the coverage sought, including both the master policy and the SBCL. *Nu-Air,* 822 F. 2d at 989-94. FCIA's later attempt to reject this binding contract because of economic conditions in Nigeria[4] did not undermine its enforceability. *Id.*

5. Relatedly, FCIA also neglects to mention that under the written termination notice provision of the policy, FCIA's belated attempt to cancel coverage did not deprive Nu-Air of protection for the Nigerian transaction. *Nu-Air,* 822 F. 2d at 992. Further,

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4/ Apparently to make its refusal to honor its agreement with Nu-Air more palatable, FCIA states it attempted to withdraw SBCL coverage due to "a virtual economic collapse in Nigeria at that time," Pet. p. 5. This so-called "collapse" was really only "import restrictions imposed by the Nigerian government." *Nu-Air,* 822 F. 2d at 990.

it is undisputed that FCIA approved and never cancelled the $200,000.00 master policy. *Id.* at 990, n. 7.

6. FCIA also omits from its "Factual Background" the inconsistencies between the reasons it gave for refusing to pay Nu-Air's claim at the time the loss was incurred and the reasons it later gave for purposes of litigation. When Nu-Air made its claim, the only reason FCIA ever articulated in rejecting it was its unconditional denial that coverage had ever been in force. *Nu-Air,* 822 F. 2d at 993. After suit was filed, however, FCIA relied for the first time on the technical policy defenses of untimely notice and tardy payment of premiums. *Id.*

As the Eleventh Circuit recognized, FCIA's after the fact reliance on these technical forfeiture defenses did not insulate it from liability. To the contrary, because it unconditionally denied coverage had ever existed and because it kept for itself the premiums Nu-Air had paid, under general principles of waiver and estoppel, FCIA had no right to to assert the forfeiture defenses at all. *Id.* at 993-94.[5]

B. Opinions Below

Just as FCIA's "Factual Background" by-passed and inaccurately depicted critical facts and issues, so too its "Opinions Below" section blurred and misstated the actual holdings of the district and appellate courts. As before, FCIA has apparently taken this approach in furtherance of its effort to create the appearance of reviewability. Before examining the specific legal reasons why the writ would be denied, it is therefore necessary to first accurately state the precise holdings below.

5/ Moreover, although the parties agreed on a number of facts, contrary to FCIA's contention they did not ever "stipulate" that Nu-Air "had breached" the policy. Pet. p. 6. The only record support given by FCIA for this assertion is the order of the district court, which the Eleventh Circuit reversed on all counts. *See* Pet. p. 6, citing 29a. Indeed, even FCIA conceded in the district court that there was a disputed issue of fact as to the timeliness of the notice of claim and proof of loss. R4-13. Further, FCIA admitted it was not prejudiced by the asserted untimeliness. R5-13.

1. The District Court's Order

Contrary to FCIA's statement, the district court did not hold "that Nu-Air's *conceded violations* of the policy terms barred its recovery." Pet. p. 7 (emphasis supplied). Although the parties stipulated to a number of things, Nu-Air never stipulated or conceded in any way that it had violated the terms of the policy. *See* n. 5, *supra*. Instead, FCIA merely attempted to use the stipulated facts to argue that Nu-Air had breached the policy, and in an unpublished decision that cited no legal authority for any of its conclusions, the district court agreed. *Nu-Air,* 822 F. 2d at 990 n. 9. Nevertheless, nothing in the district court's order, including the portions quoted by FCIA, Pet. p. 7, stated Nu-Air "conceded" violating the policy. *Id.*

2. The Eleventh Circuit's Decision

Attempting to generate conflicts where none exist and inflate this case with an artificial aura of federal importance, FCIA badly overstates the limited reach of Eleventh Circuit's narrow and carefully drawn conclusions of law. So extensive are FCIA's overstatements that they fatally infect all of the arguments it later raises in its petition. They must therefore be corrected at the outset.

a. *Immunity*

FCIA faces an insurmountable obstacle in attempting to erect a conflict among the Circuits based on the Eleventh Circuit's decision that FCIA is not immune from Nu-Air's tort claim, because no federal appellate court has *ever* held FCIA so immune. Consequently, while FCIA is correct in stating that the Court of Appeals decided it "was subject to suit for its alleged negligent misrepresentations to Nu-Air," it is totally incorrect in its further assertion that in doing so, the Eleventh Circuit "specifically declined" to follow other cases recognizing immunity in like circumstances. The Eleventh Circuit did not "specifically decline"

to follow the cases FCIA cited. It simply reviewed those cases and their holdings with approval, showing why they do not apply to the specific facts at hand. *Nu-Air,* 822 F. 2d at 995-996.

Relatedly, FCIA dwells at length on the Eleventh Circuit's supposed conclusion regarding the immunity of Eximbank. Pet. pp. 7-8. A careful reading of the Court of Appeals' decision, however, reveals the Eleventh Circuit reached no conclusion at all on that issue, much less a reviewable one. *Nu-Air,* 822 F. 2d at 996.

In this regard, the record and the Eleventh Circuit's opinion show that Eximbank was not a defendant below and is not a party here. The Court of Appeals' one sentence, qualified suggestion that "there is no reason to think that Eximbank would be immune from suit" is therefore only dictum. *Id.* at 996. Moreover, this remark is preceded by almost two pages of separate and independent reasons why FCIA, who was a defendant and is a party here, is not immune. *Id.* at 995-96. Even if the Eleventh Circuit's comment concerning Eximbank had been erroneous, the *Nu-Air* decision did not rest on that comment. It cannot now afford a basis for review.

b. *"Federal Common Law"*

FCIA's statement of the Eleventh Circuit's holding on the so-called "federal common law" issue is flawed in much the same way as its statement of the Court's immunity holding. Contrary to FCIA's suggestion, Pet. p. 8, the Court of Appeals did not "reject" any of the federal appellate decisions on which FCIA relied. Indeed, as to several cases, it did not even have the opportunity to do so, since those cases[6] are offered here for the

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6/ *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943); *United States v. County of Allegheny,* 322 U.S. 174 (1944); *United States v. Seckinger,* 397 U.S. 203 (1970).

very first time in support of a point FCIA never raised in the Eleventh Circuit. FCIA's remaining cases were, as in the immunity issue, only reviewed and distinguished. They were not "rejected." *Nu-Air,* 822 F. 2d at 994-95.[7]

REASONS FOR DENYING THE WRIT

In its "Reasons for Granting the Writ," FCIA elevates and recyles two relatively minor fall back arguments[8] it unsuccessfully advanced in the Eleventh Circuit. FCIA contends that because it issues insurance on behalf of Eximbank, (1) it is immune from Nu-Air's tort claim, and (2) the generally accepted contract principles of waiver and estoppel do not apply to it.

Review of FCIA's contentions under the specific facts of this case reveals FCIA has vainly tried to force a garden variety insurance claims dispute between private litigants into Rule 17's ill-fitting mold. In its struggle, FCIA relies on flawed factual and legal premises and resorts to inapt analogies to inapplicable authorities and circumstances. The resulting analysis is predictably and markedly strained.

When stripped of distractions, two considerations of paramount importance for certiorari purposes emerge from FCIA's petition. First, there is no basis for reviewing the Eleventh Circuit's decision on conflict grounds, because no federal appellate court has ever held that FCIA is immune from suit in tort, or that ordinary contract principles of waiver and estoppel do not apply to it. Second, FCIA's newly devised but undocumented

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7/ In a footnote, FCIA quarreled with the Third Circuit's decision in *Lovell Mfg. v. Export-Import Bank,* 777 F. 2d 894 (3rd Cir. 1985), a case on all fours and the only other federal appellate decision ever addressing the precise issue involved here. The Third Circuit reached the identical conclusion the Eleventh Circuit reached in *Nu-Air. Nu-Air's* specific reliance on *Lovell* demonstrates consistency and uniformity, not division, in the Circuits' approach to the question. *Nu-Air,* 822 F. 2d at 994-95.

8/ Both of these issues together occupied only a little more than four of the 39 pages of FCIA's Eleventh Circuit brief.

speculations notwithstanding, this case does not present any important questions of federal law this Court should decide. The Petition for Writ of Certiorari should be denied.

I. The Eleventh Circuit's Decision Does Not Conflict With Any Other Federal Appellate Decision Holding FCIA Immune From Suit In Tort.

FCIA seeks review of the Eleventh Circuit's holding that FCIA is not immune from Nu-Air's negligent misrepresentation claim on the ground that Nu-Air's holding conflicts with the Eighth Circuit's decision in *Bushman v. Seiler,* 755 F. 2d 653, 655-56 (8th Cir. 1985), and the Ninth Circuit's decision in *Anderson v. Occidental Life Insurance Company,* 727 F. 2d 855 (9th Cir. 1984). FCIA also asks for review of the Court of Appeals' "premise" that Eximbank is not entitled to sovereign immunity from such suit on the ground that this determination "was wrong." Pet. p. 16. Because no real, direct conflict exists between the Eleventh Circuit's decision and the decisions of the Eighth and Ninth Circuits, and because the Eleventh Circuit's single remark regarding Eximbank is only dictum, there is no basis for granting certiorari to review FCIA's immunity argument.

A. *The Eleventh Circuit's decision does not conflict with the decisions of the Eighth and Ninth Circuits.*

The Eighth Circuit's decision in *Bushman* and the Ninth Circuit's decision in *Anderson* do not conflict with *Nu-Air.* This follows immediately from the fact that they have absolutely nothing to do with the specific issue the Eleventh Circuit decided, namely, whether FCIA is immune from its misrepresentation to its customers regarding the existence of commercial credit export risk coverage. *Nu-Air,* 822 F. 2d at 994-95.

Bushman and *Anderson* are medicare cases. They do not involve federal export insurance, FCIA, or FCIA's relationship with Eximbank. Likewise, they do not involve any policy provision even remotely resembling the one in this case under which

FCIA, not Eximbank or the federal government, was the *sole* insurer of the risk. *Nu-Air,* 822 F.2d at 994, 996. Instead, *Bushman* and *Anderson* are controlled by the distinct and specific body of federal statutes, regulations, and cases governing the medicare program, out of which the rule has evolved that medicare intermediaries and carriers can be governmental agents for immunity purposes. *Bushman,* 755 F. 2d at 655; *Anderson,* 727 at 856.

So different is the medicare setting from the foreign export commercial credit insurance framework that it does not even provide a useful analogy. Unlike FCIA, insurance companies acting as medicare carriers are true fiscal intermediaries, subject to extensive and specific federal regulations. More importantly, the United States is the real party in interest when claims are made against medicare carriers, because recovery would come from the federal treasury. *Bushman,* 755 F.2d at 655; *Anderson,* 727 F.2d at 856.

FCIA, on the other hand, is not even mentioned in Eximbank's enabling statute or in any regulations governing it. Eximbank's own regulations contain no mention of required policy terms. Further, as both Circuits considering the issue have concluded, claims against FCIA under the specific commercial credit provision in issue here are solely against FCIA, a private entity. Unlike the medicare cases, they do not involve the United States or the public fisc. *Nu-Air,* 822 F.2d at 994, 996; *Lovell Mfg. v. Export-Import Bank of U.S.,* 777 F. 2d 894, 899-901 (3rd Cir. 1985).

In sum, no federal appellate decision has ever held FCIA immune from suit in tort based on the grounds FCIA asserts here

or on any other grounds.[9] For this reason, and because the Eighth and Ninth Circuits' medicare decisions are not even remotely related to this specific issue, FCIA's immunity argument presents no conflict within the meaning of Rule 17.[10]

That there is no true and direct conflict between *Nu-Air* and *Bushman* or *Anderson* concludes the matter for certiorari purposes. So seriously flawed is FCIA's analysis of the immunity issue, however, further response is required.

First, FCIA's own inherent characteristics disable it from claiming official immunity under the controlling decisions. Unlike the high level federal government officials, officers, employees, and others in government service in the cases it cites,[11] FCIA is nothing more than an unincorporated association of large, private insurance companies, combined for the specific purpose of making a profit. It is not an agency, officer, or employee of the federal government, and its member companies do not employ federal officers or employees.

The significance of this distinction is that, as the Eleventh Circuit stated, official immunity is extended only where the threat of liability might inhibit the fearless, vigorous, and effective

9/ When challenged in the Eleventh Circuit to produce even one such case, FCIA triumphantly cited the district court decision in *Hamilton Bank v. Export-Import Bank,* 634 F. Supp. 195 (E. D. Pa. 1986), urging that the *Hamilton Bank* court "accepted FCIA's contention that FCIA should be held immune from suit for any tortious conduct on its part." Appellee's Br. at 31. Review of *Hamilton Bank* revealed, however, that FCIA constructed its argument from a small sentence fragment it had wrenched from context. A reading of the entire sentence revealed the district court in *Hamilton Bank* did *not* hold FCIA immune, but instead only identified immunity as an argument FCIA was raising. 634 F. Supp. at 203. FCIA does not cite *Hamilton Bank* in this Court.

10/ To the contrary, *Nu-Air* reviews *Bushman's* rationale with approval, noting that it provides support for the conclusion that there is no basis for extending official immunity to FCIA in the instant case. *Nu-Air,* 822 F.2d at 995.

11/ *See Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (senior aides and advisors of the President of the United States); *Butz v. Economou,* 438 U.S. 478 (1978) (federal executive officials in the Department of Agriculture); *Barr v. Matteo,* 360 U.S. 564 (1959) (director of important government agency).

administration of government policies. *Nu-Air,* 822 F.2d at 995. This concern arises most frequently when the defendant is an individual in public service, but seldom arises where, as here, the defendant's connection with the government is limited to a business relationship. *Id.*, citing *Doe v. McMillan,* 412 U.S. 306 (1973); *Barr v. Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959); *Bushman,* 755 F. 2d at 656.

In other words, as this Court recently reiterated, the protection under official immunity that FCIA seeks in this case is reserved for high level policy decision making by federal officials, where it serves a legitimate government purpose. *Westfall v. Erwin,* 484 U.S. ____, 108 S.Ct. 580, 98 L.Ed. 4087, 4080, 4089 (1988); *Harlow,* 457 U.S. at 807.[12] As the Eleventh Circuit stated, no worthwhile purpose would be served by affording FCIA immunity from liability for misrepresentations it makes to customers in selling and administering commercial credit risk insurance. *Nu-Air,* 822 F.2d at 996. Keeping in mind FCIA's private status, its purely profit oriented objective, and its responsibility as the sole insurer of the specific risk in this case, there is no basis for concluding that the alleged misrepresentations giving rise to this dispute come within the public service and public benefit rationale of *Barr* and its progeny.[13]

Second, just as FCIA is not the sort of federal government official or officer to whom official immunity has been extended,

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12/ Moreover, even if official immunity applied to this case, it is only a qualified immunity which FCIA cannot invoke on these facts because FCIA has not made the requisite threshold showing of good faith in the performance of a discretionary function, and it cannot do so. *Harlow,* 457 U.S. at 815; *Butz,* 438 U.S. at 486.

13/ In addition to *Bushman* and *Anderson,* FCIA relies on two other medicare cases that are distinguishable on the same grounds, *Matranga v. Travelers Insurance Co.,* 563 F. 2d 677 (5th Cir. 1977) and *Peterson v. Weinberger,* 508 F. 2d 45 (5th Cir.), cert. denied, 423 U.S. 830 (1975). These pre-October 1, 1981 decisions of the former Fifth Circuit are binding on the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F. 2d 1206 (11th Cir. 1981) (en banc). In *Nu-Air,* the Court of Appeals specifically approved them, noting that they present "wholly different considerations" from the instant case. *Nu-Air,* 822 F.2d at 996.

so too Nu-Air's tort claim is not the "harassing," "unjustified," "frivolous," or "insubstantial" litigation against which FCIA's immunity cases are intended to protect. *See Davis v. Sherer,* 468 U.S. 183, 195 (1984); *Harlow,* 457 U.S. at 808. To the contrary, the record shows Nu-Air's misrepresentation claim is founded on (1) sworn testimony by an insurance broker that FCIA promised to provide full coverage for the Nigerian transaction; (2) the parties' stipulation that Nu-Air relied on the promised coverage in consummating the Nigerian sale, and would not have gone forward without it; (3) the parties' stipulation that FCIA retained and has never refunded the premiums Nu-Air paid for the coverage; and (4) FCIA's subsequent refusal to cover Nu-Air's loss. Indeed, FCIA has never even suggested Nu-Air's misrepresentation claim was "harassing," "unjustified," "frivolous," or "insubstantial."

Third, FCIA's immunity argument fares no better when it travels under the name "derivative sovereign immunity." Although FCIA attempts to skirt the point by relying on its separate reinsurance agreement with Eximbank, Pet. pp. 3, 11, 16, FCIA cannot derive sovereign immunity because, as noted above, Nu-Air's commercial credit claim went solely to FCIA and did not place the United States financially at risk. *Nu-Air,* 822 F.2d at 994, 996; *Lovell Mfg.,* 777 F.2d at 899-901. As the *Nu-Air* and *Lovell* decisions illustrate, contractual indemnity by the government cannot artificially create sovereign immunity. *Brady v. Roosevelt Steamship Company,* 317 U.S. 575, 583-84 (1943); *Rochester Methodist Hospital v. Travelers Insurance Company,* 728 F. 2d 1006, 1014 (8th Cir. 1984); *Foster v. Day and Zimmermann,* 502 F. 2d 867, 875 (8th Cir. 1974).

Fourth, as the Eleventh Circuit stated, the Supreme Court has repeatedly recognized that immunity is not favored when a government agency enters the commercial sphere. *Franchise Tax Bd. of California v. United States Postal Serv.,* 467 U.S. 512, 104 S.Ct. 2549, 81 L.Ed.2d 446 (1984). Certainly when as in the instant case a private association of large, profit motivated

insurance companies seeks to immunize itself from its torts under the theory that it is but an agent of such an agency, immunity is even less favored. *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939).[14]

Finally, the very language of the insurance policy issued in this case undercuts FCIA's immunity claim. Article IX, "Action Against Insurers," specifically contemplates and provides for the institution of actions against FCIA. Article IX does not limit such actions to suits sounding in contract. Since under well-settled principles of insurance law this provision must be construed against FCIA as the party who drafted the contract, it must be assumed that tort suits are authorized as well.

B. *The Eleventh Circuit's decision does not present any reviewable holding regarding the immunity of Eximbank.*

FCIA also contends the Supreme Court should review this case on the ground that the Eleventh Circuit "was wrong in determining that Eximbank does not enjoy sovereign immunity from negligent misrepresentation suits." Pet. p. 16. Since the Eleventh Circuit made no such determination, this argument needs only brief response.

FCIA's contention rests on the Eleventh Circuit's single passing remark that "there is no reason to think that Eximbank *would be* immune from suit." *Nu-Air,* 822 F. 2d at 996 (emphasis

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14/ Of course, even as to other types of coverage in which FCIA is not the direct, sole insurer and its participation is arguably more limited to its involvement as Eximbank's "agent," it does not follow that it would derive immunity through Eximbank. There is no federal appellate authority holding Eximbank immune, and even if there was, such immunity would not automatically encompass FCIA. "The government does not become the conduit of its immunity in suits against its agents or employees merely because they do it to work." *Keifer & Keifer,* 306 U.S. at 388. The mere fact that Congress created Eximbank and authorized the export credit insurance program does not mean that a suit on an insurance policy issued by FCIA necessarily involves a question of federal law. *See Gensplit Finance Corp. v. FCIA,* 616 F. Supp. 1504, 1507 (D.C. Wis. (1985).

supplied). Even if this comment could be construed as an actual holding that Eximbank is not immune, it cannot provide any basis for review on conflict grounds, since no federal appellate court has ever held otherwise.

This Court need not, however, address the question of Eximbank's immunity or the correctness of the Eleventh Circuit's comment. Eximbank is not a party to this litigation. The above quoted passage is, at the very most, dictum. The Eleventh Circuit's actual holding regarding FCIA is supported by almost two pages of independent reasoning. *See Nu-Air,* 822 F.2d at 995-96.

It is understandable that FCIA wants immunity from its torts. Operating in the commercial sphere in competition with other private insurance companies issuing similar policies, the protection of immunity would give FCIA an immense advantage over other companies who would continue to be held accountable for their similar conduct.

But the advantage FCIA seeks is unwarranted and unfair, and this Court has not extended it in these circumstances. *See Franchise Tax Board of California v. United States Postal Serv.,* 467 U.S. 512, 517 (1984). Perhaps even worse, the new rule FCIA urges this Court to adopt is seemingly without limit. Logically extended, it would immunize virtually all private persons, companies, or other entities who ever act on behalf of statutorily authorized agencies of the federal government. This result is inconsistent with the rationale of the controlling Supreme Court and Circuit Court cases, and should not be put in place here.

II. The Eleventh Circuit's Decision Does Not Conflict With Any Other Federal Appellate Decisions Holding General Contract Principles of Waiver and Estoppel Do Not Apply To FCIA.

FCIA also contends that the Eleventh Circuit's decision conflicts with decisions of the First, Fifth, and Ninth Circuits holding federal common law can govern the rights and liabilities of parties to an insurance contract issued under a federal government insurance program even though private insurers actively participate in it. Pet. p. 21, citing the flood insurance decisions in *Brazil v. Giuffrida,* 763 F.2d 1072 (9th Cir. 1985), *United States v. Parish of St. Bernard,* 756 F.2d 1116 (5th Cir. 1985), *cert. denied,* 474 U.S. 1070 (1986), and *Atlas Pallet, Inc. v. Gallagher,* 725 F.2d 131 (1st Cir. 1984).[15] As before, FCIA's conflict argument cannot withstand scrutiny, because it is based on an erroneous and overbroad depiction of the Eleventh Circuit's limited holding on the narrow issue before it.

In this regard, review of the Eleventh Circuit's opinion shows that contrary to FCIA's assertion, the Court did *not* make the sweeping declaration that state rather than federal law governs insurance policies issued pursuant to federal government insurance programs. It did not have to decide that broad issue, because on the facts of this case, it was not presented.

The only issue actually before the Eleventh Circuit, and hence the only issue it decided, was whether FCIA is entitled to avoid the application of general state law contract principles of *waiver* and *estoppel* in issuing *commercial credit risk coverage* on the ground that it issues insurance on behalf of Eximbank. *Nu-Air,* 822 F.2d at 994. On this single, narrow question, the Eleventh Circuit held only "that traditional principles of waiver and estoppel apply." *Nu-Air,* 822 F.2d at 995.

15/ FCIA's list of purported conflict cases also includes *Beverly v. Macy,* 702 F.2d 931 (11th Cir. 1983) and *West v. Harris,* 573 F.2d 873 (5th Cir. 1978), *cert. denied,* 440 U.S. 946 (1979). *Beverly* is, however, an Eleventh Circuit case and cannot serve as the basis for a reviewable conflict. Likewise, *West* is a pre-October 1, 1981 Fifth Circuit decision which the Eleventh Circuit has never rejected. *See Bonner v. City of Prichard, supra.*

This precise issue - FCIA's so-called "federal common law" question - was not before the First, Fifth, or Ninth Circuits in any of the flood insurance cases FCIA cites. As before, FCIA cannot present the square, direct conflict required for conflict review.[16]

FCIA's misplaced reliance on the dissimilar flood insurance scenario does not divert attention from a 1985 Third Circuit decision on all fours that decided the precise issue before the Court even before *Nu-Air*. In *Lovell Manufacturing v. Export-Import Bank of the United States*, 777 F.2d 894 (3d Cir. 1985) the plaintiff insured sued FCIA in a policy dispute arising out of commercial credit risk coverage. Exactly as in this case, under the policy, FCIA was the sole insurer of commercial credit risk and Eximbank was the sole insurer of political risk. *Lovell*, 777 F. 2d at 896. Like the plaintiff here, acting specifically in reliance on the coverage, the *Lovell* plaintiff paid premiums and sold products to a foreign purchaser, who eventually defaulted. *Id.* Again mirroring the instant situation, the district court granted FCIA's motion for summary judgment on the ground that, as an agent of Eximbank, higher standards for establishing estoppel against the government applied. *Lovell*, 777 F.2d at 897.

The Third Circuit conducted an exhaustive review of all of the same grounds for avoiding estoppel that FCIA has reasserted in this case, including the agency and reinsurance agreements between Eximbank and FCIA. Exactly as here, the Court of

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16/ Other significant distinctions between the instant case and FCIA's national flood insurance program cases abound. In contrast to the instant situation, the flood program has its own distinct and extensive statutory and regulatory framework, and flood insurance policy terms are expressly dictated by federal regulations, the implied waiver of which could arguably frustrate specific governmental policies. Moreover, unlike the instant case in which FCIA acts as the sole insurer of the commercial credit risk coverage in issue, under the national flood insurance program, the federal government, not the insurance companies, bears the risk. Significantly, even in the distinctly federal context of flood insurance law, however, FCIA's own cases acknowledge that ordinary, standard insurance law principles apply. *See Brazil*, 763 F.2d at 1075; *West*, 573 F.2d at 881; *Beverly*, 702 F.2d at 937; *Atlas Pallet, Inc.*, 725 F.2d at 135.

Appeals rejected FCIA's contentions and held traditional estoppel principles, not more stringent government standards, apply to FCIA as the sole insurer of commercial credit risks. *Lovell Manufacturing,* 777 F. 2d at 899-901; cited in *Nu-Air,* 822 F.2d at 994-95.

In direct refutation of FCIA's argument that more rigid government estoppel standards should apply because Eximbank (and hence the federal government) are financially at risk under the reinsurance agreements, Pet. pp. ii, 12, 16, the *Lovell* Court stated:

> The reinsurance agreements only run between Eximbank and FCIA. The fact that FCIA must now look to Eximbank for recoupment on Lovell's claim, pursuant to an entirely separate agreement to which Lovell was not a party, does not affect the duties owed to Lovell by FCIA under the insurance policies it issued. The obligation to Lovell resides with FCIA and not with Eximbank. Moreover, it is FCIA's potential claim against the government under the reinsurance agreements, and not Lovell's, which is directed toward public fisc; this is not the case before us.

777 F.2d at 901. The Eleventh Circuit specifically adopted this analysis and conclusion in this case. *Nu-Air,* 822 F.2d at 994-95.

Lovell and *Nu-Air* vividly emphasize a unique feature of the FCIA - Eximbank relationship that at once distinguishes all of FCIA's other authorities, dismantles FCIA's federal common law argument, and undermines its entire petition. Regardless of whether FCIA is or is not Eximbank's subordinate or agent with respect to certain aspects of the issuance of export credit insurance, as to the specific kind of insurance in issue here - commercial credit risk coverage - it has been conclusively decided by both of the federal appellate courts that have considered the issue that FCIA is the independent and sole insurer of the risk.

Nu-Air, 822 F.2d at 994; *Lovell,* 777 F.2d at 901.[17] Because FCIA is a private entity[18] and the public treasury is not at risk from Nu-Air's claim, traditional equitable principles of waiver and estoppel apply. *Id.*

III. The Eleventh Circuit's Decision That FCIA Is Subject To Ordinary Contract Principles Of Waiver And Estoppel And To Suit In Tort Does Not Present Any Important Questions Of Federal Law That Should Be Settled By The Supreme Court.

Although it is difficult to classify FCIA's remaining arguments with precision, their apparent purpose is to attempt to show that the Eleventh Circuit's decision in *Nu-Air* presents important federal questions worthy of this Court's attention and time. Specifically, FCIA complains that (1) Nu-Air is at odds with *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943), and its progeny; (2) in a footnote to its opinion, the Eleventh Circuit wrongly left open the question of the extent to which federal law governs insurance contracts issued on behalf of Eximbank; and most remarkably, (3) the *Nu-Air* decision will cause U.S. companies to reduce their exports abroad. Pet. pp. 4, 8, 9, 16-20. All three arguments suffer from the same two decisive defects. They present no grounds for review, and they are just plain wrong.

A. *FCIA's Clearfield Trust argument is not properly before this Court.*

Apparently equating the instant garden variety insurance

17/ In a footnote, FCIA claims only that *Lovell* was wrongly decided. It does not contest that *Lovell's* critical facts are virtually indistinguishable from the instant case and that its holding is directly opposed to the position FCIA takes here.

18/ When a dispute involves only the rights of private litigants, with no substantial rights or duties of the federal government being directly involved, it is inappropriate to develope federal rules of decision. *Miree v. Dekalb County, Georgia,* 433 U.S. 25 (1977).

policy dispute between two private entities with a "contract through which the United States is exercising its constitutional function," Pet. p. 17, FCIA contends the Eleventh Circuit's decision runs afoul of the goal of uniformity expressed in *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943). FCIA's reliance on *Clearfield Trust,* however, comes too late. Since FCIA never presented its national uniformity argument at any time in the Court of Appeals, it cannot now urge that it provides a basis for review by the Supreme Court. *Delta Air Lines v. August,* 450 U.S. 346, 362 (1981). Indeed, before filing its petition for certiorari, FCIA had never even cited *Clearfield Trust* or the other two cases it presents in the context of its *Clearfield Trust* argument, *United States v. County of Allegheny,* 322 U.S. 174 (1944) and *United States v. Seckinger,* 397 U.S. 203 (1970).

Evidently in tacit recognition of this jurisdictional dilemma, FCIA's petition carefully refrains from claiming *Clearfield Trust* conflicts with the Eleventh Circuit's decision in *Nu-Air.* Obviously, no such conflict argument is possible, since the Court of Appeals did not mention and never even had the opportunity to consider FCIA's *Clearfield Trust* argument. Given FCIA's reliance on the medicare and flood cases, its readiness to use remote and badly strained analogies has already been demonstrated. It can therefore reasonably be assumed that if FCIA had thought *Clearfield Trust* properly before this Court, it would have based a conflict argument on it as well, even though that case involves federal commercial paper, not insurance.

FCIA's reliance on *Clearfield Trust* is telling for the additional reason that it signals FCIA's virtual abandonment of the main argument it used below in support of its federal common law theory. In the Eleventh Circuit, FCIA's attempt to escape the application of general contract principles of waiver and estoppel rested on *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947). FCIA urged under that decision that strict technical compliance with all policy terms was compelled because Nu-Air's policy was "issued pursuant to a federal government insurance program." Appellee Br. at 28.

In *Nu-Air,* the Eleventh Circuit considered *Federal Crop Insurance Corp. v. Merrill* carefully and at length. *Nu-Air,* 822 F.2d at 994. Having done so, it reached the identical conclusion that the Third Circuit had reached in *Lovell* - that "traditional equitable principles of waiver and estoppel apply." *Id.* at 995. That FCIA has now relegated *Federal Crop Insurance Corp. v. Merrill* to a single mention in a footnote evidences its unspoken concession that it cannot effectively challenge the Court of Appeals' thorough analysis.

B. *The Eleventh Circuit's decision is not inconsistent with Clearfield Trust.*

Even if *Clearfield Trust* and its progeny were now properly before this Court, the result in this case would be unaffected. The fear that FCIA now expresses for the first time - that *Nu-Air* will subject all federal government insurance programs to "the vagaries" of "over 50 set of rules, procedures, statutes and regulations" - is not rooted in reality. The Eleventh Circuit's decision does not impact on all federal government insurance programs. Indeed, it does not even impact on all foreign credit export insurance or insurers. Instead, it applies strictly to FCIA, a private association of large insurance companies, and even then only to FCIA's contractual liability under the commercial credit risk provision of its export credit policies. In fact, FCIA not only concedes the limited reach of the Eleventh Circuit's opinion, it even complains about it.[19]

FCIA's new found anxiety is further deflated by the reality that the application of state rules of estoppel and waiver to the specific type of coverage in issue here will yield few, if any, different results. The majority of the Circuits do recognize estoppel even against the government. *United States v. Asmar,* 827 F.2d 907, 911 (3rd Cr. 1987). As FCIA's own authorities

19/ Although Eximbank is not a party to this case, FCIA complains that the Eleventh Circuit has left open the question of the extent to which federal common law governs insurance contracts issued on Eximbank's behalf. Pet. p. 18.

recognize, even in the context of the federal flood insurance program, federal courts apply standard, general principles of insurance law. There is nothing to indicate that the ordinary, traditional estoppel and waiver principles applied here are not such standard, general principles.

Relatedly, although FCIA gravely warns of "the vagaries" of over "50 sets of rules," it does not cite even a single case showing the instant result would be different under another state's estoppel and waiver rules. For that matter, FCIA has not cited and cannot cite even one federal appellate decision declining to apply ordinary estoppel and waiver rules where, as here, a private insurer participating in a federal insurance program is the sole insurer of the specific risk under consideration. *See, Nu-Air,* 822 F. 2d at 994; *Lovell,* 777 F.2d at 901. FCIA's assertion of "vagaries" and "over 50 sets of rules" notwithstanding, at least with respect to the single issue presented here, it is the ordinary, general state law rules that are settled and consistent, and the so-called federal common law that is unknown and vague.[20]

Of course, as a practical matter, FCIA's entire discussion is only conjecture and speculation. At this juncture, it cannot be conclusively said that on remand it will even be necessary for Nu-Air to resort to waiver and estoppel principles. Nu-Air has never conceded breaching the policy, and as there is no binding ruling in this case that it has. The district court opinion concluding Nu-Air violated the policy terms was reversed on all counts. The Eleventh Circuit's decision merely noted FCIA's policy defense arguments, but never held them meritorious. *Nu-Air,* 822 F.2d at 993; *see* n. 5, *supra.*

Finally, FCIA's own behavior refutes its *Clearfield Trust* argument. FCIA laments that *Nu-Air's* estoppel and waiver holding makes the world of commercial credit export insurance too vague, uncertain and unpredictable for it to conduct business.

20/ Of course, if as FCIA's cases suggest the same result will be reached whether federal or state law is applied, no ground for review is presented. *See Sommerville v. United States,* 376 U.S. 909 (1964).

If FCIA's argument had any validity at all, its member companies would have disbanded the association, or at least restructured FCIA's contract with Eximbank when the Third Circuit reached the identical conclusion three years ago in *Lovell.* FCIA is still writing commercial credit risk coverage, and contrary to its suggestion, the federal government's export credit insurance program has not screeched to grinding halt.

Relatedly, FCIA cannot reasonably argue that it will face an insurmountable task in determining the applicable state law when it issues commercial credit export coverage. Even assuming that there are states following rules of waiver and estoppel differing from Florida's, it will not be a burdensome or even an unusual task for Aetna, Continental, Fireman's Fund, Liberty Mutual and FCIA's other member companies to find the controlling rules. These large insurance companies do business, issue policies, and engage in litigation across the country every day. Determining the specific law in a particular locality is neither difficult nor new to them.

C. *The Eleventh Circuit's decision does not present any reviewable holding regarding application of the federal common law to Eximbank.*

FCIA stages a strawman attack on the footnote in *Nu-Air* that specifically leaves open the question of the extent to which federal law governs insurance contracts issued on behalf of Eximbank. *Nu-Air,* 822 F.2d at 995 n.24. Essentially, FCIA makes the broad argument that in refraining from deciding the question, the Eleventh Circuit's decision will plunge the totality of the law governing export credit insurance into uncertainty. Pet. pp. 18-20. Such histrionics cannot withstand even superficial scrutiny.

First, although the point is almost lost in FCIA's petition, Eximbank is not a party to this litigation. Accordingly, that the Eleventh Circuit's *Nu-Air* opinion refrains from reaching any legal conclusions specifically regarding Eximbank is only proper. The footnote that is the target of FCIA's attack merely clarifies that

the Eleventh Circuit has fulfilled its duty of deciding only the specific case and controversy before it.

Second, FCIA stands on its head the reality of the situation with its suggestion that in leaving open the question of the applicability of the federal common law to Eximbank, the Eleventh Circuit has "artificially divided" export credit risk into political and commercial coverage. Pet. p. 18. It was FCIA and Eximbank, *not* the Court of Appeals, who decided to divide export credit coverage into political and commercial components and who decided that FCIA would be the sole insurer of the latter. Presumably in making this distinction FCIA and Eximbank did not intend it to be legally meaningless. Having specifically agreed to this unique division of responsibilities and risks, FCIA's present expressions of shock, alarm, and fear that it will be impaired in performing its function because it cannot discern the legal standards applicable to it, Pet. pp. 12, 19, 20, cannot be taken seriously.

In other words, even if as FCIA asserts this separation of risks is "artificial," "absurd," "untenable," "inconceivable," and "makes no sense," Pet. p. 18-20, FCIA cannot be heard to complain. It agreed with FCIA to apportion the risks in this fashion, and at least since *Lovell* was decided in 1985, both entities have been well aware of the legal consequences of doing so.

In the final analysis, FCIA's petition protests too much. Bloated by gross misstatements of the Eleventh Circuit's holdings, far fetched analogies to clearly distinguishable cases and circumstances, and reliance on issues that are not even before his Court, FCIA's strained arguments collapse under their own weight.

D. *The Eleventh Circuit's decision will neither undermine federal insurance programs nor reduce exports by U.S. Companies.*

Apparently in furtherance of its effort to give the Eleventh Circuit's *Nu-Air* decision the appearance of having the broad

federal importance that it lacks, FCIA's petition is riddled with unsupported speculations and colorations. For example, attempting to emphasize its contention that it was a mere "agent" of Eximbank, FCIA states without citing any authority that "federal government control of the export credit insurance program is complete." Pet. p. 3. Yet FCIA is not mentioned in any relevant federal statutes or regulations, and as to the commercial credit coverage in issue here, it is well settled that FCIA is the sole insurer. Similarly, relying on argument by negative implication, FCIA boldly declares that "there is not a shred of evidence" that in establishing the foreign credit export insurance program, "Congress was doing anything less than defining paramount interests." Pet. p. 20. Even if this sweeping generalization had any relevance to the specific facts of this case, there "not a shred of evidence" that in setting up Eximbank, Congress intended to immunize an unmentioned private entity such as FCIA from its torts, or place it above general principles of waiver and estoppel.

Distractions aside, this case involves nothing more than the Eleventh Circuit's carefully considered reversal of the district court's erroneous granting of a summary judgment. The real impact of this holding is confined to the instant private parties' rights and responsibilities with respect to a very specific type of insurance protection, commercial credit risk coverage. As to those rights and responsibilities, the Eleventh and Third Circuits are in complete agreement, and no other federal appellate court has ever ruled differently.

Because it relies so heavily on hyperbole and misstated premises, FCIA is inevitably tripped by its own excesses. This is perhaps best illustrated in FCIA's extraordinary assertion that if not reversed, the Eleventh Circuit's decision will ultimately reduce foreign exports by American companies. Pet. pp. 4, 9-12, 16.

Like FCIA's *Clearfield Trust* contention, this argument was never made in the Eleventh Circuit and is without record support.

Further, it is utterly illogical. It cannot reasonably be believed that a company like Nu-Air, or any company for that matter, will be motivated to increase production and exports if, as FCIA asks this Court to hold, its commercial credit export insurer can wrongly refuse to pay a covered loss, retain the premiums that were paid in good faith, and be shielded from suit in tort and contract. Instead, to the extent that reasonable speculation on the point is possible, it must be assumed that under the result FCIA desires, exports would decline because U.S. companies will fear that they will lack legal recourse against their insurer when policy claims are wrongly denied.

The district court's order cited no legal authority of any kind to support its conclusions, *Nu-Air,* 822 F.2d at 990 n. 9, and the Eleventh Circuit's thorough, well-reasoned and comprehensive opinion in *Nu-Air* was correct in reversing it. For the reasons articulated in the Court of Appeals' decision and in this response, FCIA's petition for certiorari presents no grounds for review. It should be denied.

CONCLUSION

For the foregoing reasons, FCIA's petition for Writ of Certiorari should be denied.

Respectfully submitted,

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